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No. 86-221

In The

Supreme Court of the United States

October Term, 1986

TOWNSHIP OF CLAY,
a Michigan Township,

Petitioner,

vs.

SEAWAY DRIVE-IN, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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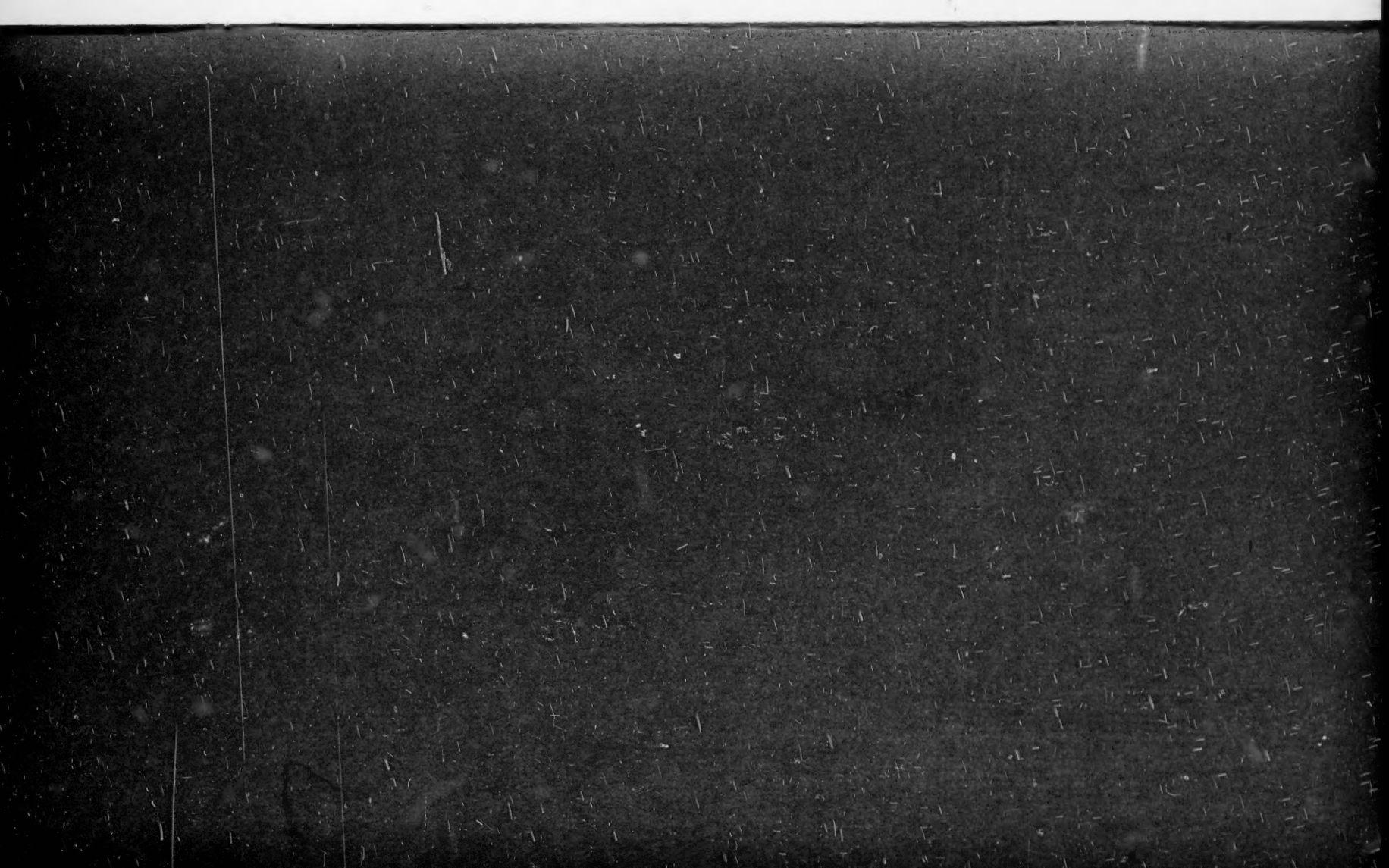

COUNTER-STATEMENT OF QUESTION INVOLVED

WHETHER A PLAINTIFF, HAVING PRESENTED FOR RESOLUTION FEDERAL CONSTITUTIONAL CLAIMS UNDER 42 USCA § 1983 AND PENDANT STATE LAW CLAIMS ARISING OUT OF THE SAME OPERATIVE FACTS, IS A "PREVAILING PARTY" FOR PURPOSES OF 42 USCA § 1988, WHERE THE PLAINTIFF PREVAILED ON THE PENDANT STATE LAW CLAIM, LEAVING THE § 1983 CLAIMS UNADDRESSED AND UNRESOLVED?

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REPORTS OF OPINIONS BELOW

The Opinion of the Court of Appeals has now been published and can be found at 791 F2d 447 (CA6, 1986). The Opinion of the District Court has not been published.

COUNTER-STATEMENT OF THE CASE

Respondent Seaway Drive-In, Inc.*, is the operator of a drive-in motion picture theatre, the Seaway Drive-In, located at 8543 Marsh Road in Clay Township, Michigan. Respondent took over an existing drive-in theatre in 1982 and sought to change the films exhibited thereon

* Respondent is a Michigan corporation having no parent company, or subsidiaries and is not an affiliate of any other corporation.

from general release family fare to sexually explicit films meant for adults only.

In August of 1982, the respondent commenced exhibiting "adult type" motion picture films at its drive-in theatre. In response to this change in policy, the Township of Clay enacted a so-called "regulatory ordinance", Ordinance No. 77, on November 24, 1982. Soon after, on December 27, 1982, the attorney for Clay Township notified the respondent in writing that the theatre would have to comply with the new ordinance.

On March 3, 1983, respondent initiated an action in the United States District Court for the Eastern District of Michigan, Southern Division, civil action No. 83-CV-9025PH, pursuant to 42 USCA § 1983. Respondent alleged therein that Sections 2, 3, 6, 7, 8, 9, 10, 11, 12 and 13 of Clay Township Ord. No. 77, as written and/or as applied, violated its rights under the *First and Fourteenth Amendments* to the *Constitution of the United States*. In addition, respondent asserted a pendant state law claim, to-wit: that Ord. No. 77 violated MCLA § 125.271 et. seq. and MCLA § 125.286 et. seq., the State of Michigan Township Zoning Enabling Act. More particularly, respondent asserted that the Seaway Drive-In Theatre was a prior non-conforming use under the Clay Township Rural Zoning Ordinance and, as such, under Michigan zoning law, MCLA § 125.286 et. seq., the theatre had a lawful and vested right to continue in operation, and that Sections 2, 6, 7, 9, 10, 11, 12 and 13 of Ord. No. 77, were taken almost verbatim from the Township Rural Zoning Ordinance, and were enacted by the Township and termed a "regulatory ordinance" in a transparent effort to avoid the strictures of Michigan zoning law applicable to prior non-conforming uses with the specific purpose of forcing respondent out of business.

Respondent's Motion for Preliminary Injunction was referred to Magistrate Paul J. Komives for hearing, which was held on March 24, and 25, 1983. At the conclusion of the hearing the Magistrate took the matter under advisement, and on April 12, 1983, the Magistrate issued his report and recommendation. On January 12, 1984, the District Court adopted the Magistrate's report and recommendation in full, striking down Sections 2, 6, 7, 9, 10, 11, 12 and 13 of Ord. No. 77 on the pendant state law claim raised by plaintiff, stating that said provisions were, "confiscatory" (Petitioner's Appendix C, p. C-9), in light of the Michigan Zoning Enabling Act, thereby leaving unaddressed the federal constitutional claims raised by plaintiff pertaining to those sections of the ordinance, and upholding Sections 3 and 8 as constitutionally valid under the *First* and *Fourteenth Amendments* to the *Constitution of the United States*. A preliminary injunction, in conformance with said *Memorandum Opinion and Order* was issued. On August 31, 1984, by consent of the parties, the aforesaid *Memorandum Opinion and Order* was made the final judgment of the court and a permanent injunction was entered enjoining the Township from enforcing Sections 2, 6, 7, 9, 10, 11, 12 and 13 against respondent.

On August 29, 1984, respondent filed a motion for attorney fees as the "prevailing party" in said action, pursuant to 42 USCA § 1988, in the amount of $20,085.80 in fees and costs. On March 25, 1985, the court denied respondent's request for attorney fees. On April 24, 1985, respondent filed a Notice of Appeal from the District Court's denial of attorney fees.

On May 19, 1986, the Sixth Circuit Court of Appeals reversed the District Court, ruling that, consistent with *Maher* v *Gagne*, 448 US 122 (1980), respondent had met the "substantiality" test and further, the § 1983 claims

and the pendant state law claims arose out of a "common nucleus of operative fact . . .", thus entitling respondent to an award of attorney fees pursuant to 42 USCA § 1988, as a "prevailing party".

REASONS FOR DENYING THE WRIT

This Honorable Court should deny the Writ of Certiorari heretofore filed in the instant matter for the reason that no substantial federal question has been presented for review. The decision of the Sixth Circuit Court of Appeals appended to the Petition for Writ of Certiorari and denominated as Appendix A, is entirely consistent with the decisions of this Court and the various Circuit Courts of Appeal which have considered the issue presented, to-wit: whether a plaintiff, having presented for resolution federal constitutional claims under 42 USCA § 1983 and pendant state law claims arising out of the same operative facts, is a "prevailing party" for purposes of 42 USCA § 1988, where the plaintiff prevailed on the pendant state law claim, leaving the § 1983 claims unaddressed and unresolved.

Simply stated, the respondent prevailed in the lower court on its pendant state law claim as to eight (8) sections of the ordinance under attack, leaving — as to those eight (8) provisions — the federal constitutional claims unaddressed.

This Court has ruled on the precise issue, stating in *Maher* v *Gagne*, 448 US 122, 132 fn #15 (1980):

> "The legislative history makes it clear that Congress intended fees to be awarded where a pendant constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the

Act. The Report of the Committee on the Judiciary of the House of Representatives accompanying HR 15460, bill substantially identical to the Senate bill that was finally enacted, stated:

> 'To the extent a plaintiff joins a claim under one of the statutes enumerated in HR 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claims for the purpose of awarding counsel fees. Morales v Haines, 486 F2d 880 (7th Cir 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. Hagans v Lavine, 415 US 528, [39 LEd2d 577, 94 S Ct 1372] (1974). In some cases, if the claim for which fees may be awarded meets the "substantiality" test, see Hagans v Lavine, supra; United Mine Workers v Gibbs, 383 US 715, [16 LEd2d 218, 86 S Ct 1130] (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact." United Mine Workers v Gibbs, supra, at 725, [16 LEd2d 218, 86 S Ct 1130].'
>
> HR Rep No. 94-1558, p 4, n 7 (1976)."

Turning to the two criteria, as set out in *Maher, supra*, it is beyond dispute, as the Sixth Circuit Court of Appeals put it, that the ". . . fee and non-fee claims involved a common core of facts . . .", to-wit: the enact-

actment, and subsequent enforcement of Ordinance No. 77 against respondent's drive-in theatre.

Similarly, respondent's claims met the "substantiality test". In *Hagans* v *Lavine*, 415 US 528 (1974), this Court held that, given a substantial constitutional claim which provided a basis for pendant jurisdiction to adjudicate the statutory claim, the state law question should be decided first so as to avoid unnecessary constitutional adjudication. The issue as to whether a given plaintiff has presented a "substantial" constitutional issue is a threshold question. As this Court has stated, the cause of action must be "so insubstantial, implausible, foreclosed by prior decisions of this court or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits." The District Court impliedly found the constitutional issue to be "substantial", for it exercised its jurisdiction. To again quote from *Hagans, supra*, "Given a constitutional question over which the District Court had jurisdiction, it also had jurisdiction over the statutory claim." Thus, in order to reach the statutory claim, the District Court had to initially make that threshold determination. This is precisely what the Court of Appeals ruled when it stated, "If the District Court had pendant jurisdiction over the state law claims, as it presumbaly found that it did, then the constitutional (fee) claims were 'substantial' and the fee and non-fee claims must have arisen out of a 'common nucleus of operative fact.'" (Petitioner's Appendix A, p. A-8) As required by *Hagans, supra*, the District Court turned to the statutory claim first. Having taken that course and, having arrived at a determination that under the pendant state law claim, respondent was entitled to judgment as to Sections 2, 6, 7, 9, 10, 11, 12 and 13 of Ordinance No. 77, there was no reason for it to reach

the constitutional issues pertaining to those sections — and the court so held. Thus, as to those provisions of Ordinance No. 77 which the District Court ruled invalid on state law grounds, the constitutional issues raised by respondent were left unaddressed.

To reiterate, then, in *Maher* v *Gagne*, *supra* at 133, fn #15, the Supreme Court described the circumstances in which the plaintiff may qualify for a fee award when he succeeds on a non-fee federal statutory claim joined with a fee-generating federal constitutional claim that is not decided. If both claims arise out of a "common nucleus of operative fact", the Court noted, the plaintiff may be considered the prevailing party if the constitutional claim is sufficiently substantial to support the invocation of federal jurisdiction. This approach acknowledges the reluctance of federal courts to decide constitutional questions if a nonconstitutional claim is dispositive.

In *Smith* v *Robinson*, __ US __, 104 S Ct 3457, 82 L Ed2d 746 (1984), the Supreme Court reaffirmed its position. The Court quoted from the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, 42 USC § 1988, *Id.* at __, 104 S Ct at 3456, 3467, "Congress' purpose in authorizing a fee award for an unaddressed constitutional claim was to avoid penalizing a litigant for the fact that courts are properly reluctant to resolve constitutional questions if a nonconstitutional claim is dispositive." "Congress," the Court said, "did not intend to have that authority extinguished by the fact that the case was settled or resolved on a nonconstitutional ground."

Thus, the Supreme Court affirmed the principle that a prevailing party who asserts substantial but unaddressed federal constitutional claims is entitled to attorney's fees under § 1988. *Id.* at __, 104 S Ct 3467, n. 10, 82 L Ed2d at 762, n. 10. Assuming *arguendo* that the claim for which fees are requested is reasonably related to the

plaintiff's ultimate success, the District Court may then ". . . assume that the plaintiff has prevailed on his fee-generating claim and . . . award fees appropriate to that success." *Id.* at __, 104 S Ct at 3467, 82 L Ed2d at 762.

Turning to the instant cause, the Sixth Circuit Court of Appeals noted, "The complaint attacked the ordinance as a whole on several constitutional grounds. First, it alleged that the purpose of the ordinance was to put appellant out of business and prevent it from showing sexually explicit material. Second, it alleged that the ordinance contained content-based speech restrictions. Third, it claimed that the ordinance gave the township arbitrary and uncontrolled discretion; fourth, that it was overly vague and broad; fifth, that it violates the equal protection clause and sixth, that it is an unconstitutional taking." (Petitioner's Appendix A, p. A-8) The Court of Appeals noted that, as to the eight (8) provisions of the ordinance the District Court held invalid under a pendant state law claim, the federal constitutional claims applicable thereto did not need to be addressed and were therefore left unresolved. (Petitioner's Appendix A, p. A-10, n. 10) Applying the reasoning of *Gagne* v *Maher, supra* and *Smith* v *Robinson, supra,* the respondent was accordingly entitled to "prevailing party" status entitling it to an award of attorney fees.

Those courts which have considered the issue presented herein have uniformly followed the same rationale and reached the same conclusion as the Court of Appeals reached in the instant matter. *McDonald* v *Doe,* 748 F2d 1055, 1057 (CA5, 1984); *State of New York* v *11 Cornwell Co.,* 718 F2d 22, 25 n. 3 (CA2, 1983) (*en banc*); *Williams* v *Thomas,* 692 F2d 1032, 1036 (CA5, 1983), *cert. denied sub. nom, Dallas County, Texas* v *Williams,* __ US __, 103 S Ct 3115, 77 L Ed2d 1369 (1983); *Gibbs* v *Town of Frisco City, Alabama,* 626 F2d 1218 (CA5, 1980); *Lund* v

Affleck, 587 F2d 75, 76-77 (CA1, 1978); *Kimbrough* v *Arkansas Activities Ass'n*, 574 F2d 423, 426-27 (CA8, 1978); *Seals* v *Quarterly County Court*, 562 F2d 390, 393-94 (CA6, 1977); *Bond* v *Stanton*, 555 F2d 172, 174 (CA7, 1977), *cert. denied*, 438 US 916, 98 S Ct 3146, 57 L Ed2d 1161 (1978); *Allen* v *Housing Authority*, 563 F Supp 108, 110 (E.D. Pa. 1983).

The cases cited by petitioner are simply inapposite to the matter at bar, for in each case, even though the plaintiff had prevailed on its pendant state law claim, *the federal constitutional claims were decided adversely to the plaintiff upon final hearing on the merits*. *McDonald* v *Doe*, *supra* at 1056, 1057. ("After trial, the jury responded to interrogatories that the defendant had not violated McDonald's constitutional rights, but that one defendant had been negligent in violation of state law . . ."); *Raley* v *Fraser*, 747 F2d 287, 290-91 (CA5, 1984) ("the trier of fact specifically found that Raley's constitutional rights were *not* infringed . . ." [emphasis in original]); *Haywood* v *Ball*, 634 F2d 740 (CA4, 1980) ". . . we find nothing in the statute, the legislative history or decisions on the subject which would require or justify an award of attorney's fees in a case where the plaintiff has lost on the constitutional issue after a plenary trial.")

At bottom then, petitioner argues that the federal constitutional claims pertinent to the eight provisions struck down on pendant state law grounds were either addressed and finally resolved when the District Court issued its Memorandum Opinion and Order of January 18, 1984, granting plaintiff's request for preliminary injunction (Petitioner's Appendix C), or, alternatively, the District Court had the authority to address the federal constitutional issue left unresolved upon the filing of a motion requesting attorney fees under 42 USCA § 1988. The first contention is contradicted by the Dis-

trict Court's Memorandum Opinion and Order of January 18, 1984, at p. C-9. ("Because state law grounds dispose of ordinance sections 2, 6, 7, 9, 10, 11, 12 and 13, the Court need analyze only sections 3 and 8 under constitutional standards.") The second contention is in patent contradiction to the Supreme Court's holding in *Maher* v *Gagne, supra* at 132-33, that, ". . . allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil rights claim pendant to a substantial constitutional claim . . . 'furthers the congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decisions of important constitutional issues' . . ." Yet the latter contention is precisely the course taken by the District Court which the Sixth Circuit Court of Appeals found in error.

Given a substantial constitutional issue sufficient to invoke federal court jurisdiction, where the District Court disposes of the matter on pendant state law grounds, leaving the federal constitutional issue unresolved, *Maher* v *Gagne, supra*, fn. #15, *Smith* v *Robinson, supra* requires the ". . . district court to *assume that the plaintiff has prevailed on his fee-generating claim and to award fees appropriate to that success.*" *Id.* p. 762. The lower court simply failed to follow the holding of *Smith* v *Robinson, supra*. Rather than — as *Smith* v *Robinson* requires — make such an assumption and award fees in light of the level of respondent's success in accordance with the dictates of *Hensley* v *Eckerhart*, 461 US 424 (1983), the lower court proceeded to review the record and make findings of fact and conclusions of law as to the purported "insubstantiality" of respondent's claim that Sections 2, 6, 7, 9, 10, 11, 12 and 13 of Ordinance No. 77 were invalid on federal constitutional grounds, even though that issue was left undecided by the Court's own decision ruling in

respondent's favor on pendant state law grounds. To then assert — as petitioner does — that the trial court has the authority to determine the merits of respondent's unaddressed fee-generating claim by reviewing the record of a two-day hearing on a motion for preliminary injunction and determine that respondent had failed to meet its burden that Sections 2, 6, 7, 9, 10, 11, 12 and 13 violated its federal constitutional rights, as a basis for denying its request for attorney fees, finds no judicial support anywhere. There is, therefore, no justification for reviewing the decision of the Sixth Circuit Court of Appeals in the instant matter.

CONCLUSION

To summarize, the Court of Appeals for the Sixth Circuit was quite correct in ruling that the District Court had applied an incorrect standard in determining whether respondent was a "prevailing party" for purposes of an award of attorney fees pursuant to 42 USCA § 1988.

For those reasons as hereinabove stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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